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No. 84-1181

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

POINT ONE

The issues raised by petitioner are properly before this Court.

In his brief, respondent asserts that the issues raised by petitioner are not properly before this Court because the decision of the New York Court of Appeals rested upon an "adequate and independent state ground" (Resp. Br. 9-15) and because the factual record is insufficient to support petitioner's arguments before this Court (Resp. Br. 34-41). Both of these contentions are meritless. Under this Court's

decision in *Michigan* v. *Long*, 463 U.S.1032, 77 L.Ed.2d 1201 (1983), the opinion of the New York Court of Appeals, which repeatedly refers to the Fourth Amendment and decisions of this Court construing that amendment and makes only a single, fleeting reference to the state constitution, could not be based on an "adequate and independent state ground" and, furthermore, the record below is more than sufficient to support petitioner's arguments.

A. This Court Has Jurisdiction To Review Petitioner's Claim

In a quixotic attempt to have the writ of certiorari dismissed, respondent challenges this Court's jurisdiction by claiming that the decision of the New York Court of Appeals is "expressly predicated" on the state constitution (Resp. Br. 9) and, thus, rests upon an "adequate and independent state ground." In order to make such a challenge however, respondent is required not only to ignore the opinion written by the state court, but also to misconstrue this Court's holding in *Michigan* v. *Long*, 77 L.E.2d 1201, as applied to that opinion.

In *Michigan* v. *Long*, *supra*, the state court relied on federal cases, but held the search in question violative of both the federal and state constitutions. *Id.* at 1212. Notwithstanding the specific reliance of the state court on its own constitution, this Court found no "adequate and independent state ground" and adopted a "consistent approach" [*id.* at 1213] to guide its determination of future cases. Under that approach, where a state court decision appears either to rest on federal law or be "interwoven" with federal law, the Court will "assume," absent a "plain statement" to the contrary, that the state court decided the case on federal grounds. *Id.* at 1214. Notwithstanding the clear application of *Long* to the opinion below, which repeatedly cites the Fourth Amendment and cases from this Court construing that amendment, and which does not

contain a contrary "plain statement" that the opinion rests on truly independent state grounds, respondent nevertheless feebly argues that ". . . because the adequacy and independence of the state ground is clear from the face of the state court's opinion . . . *Long* does not apply" (Resp. Br. 9). His claim is completely meritless, as even the most cursory examination of the opinion itself reveals that the presence of an adequate and independent state ground is anything but "clear" and, in fact, an alternate state ground that could serve to divest this Court of jurisdiction to hear the instant case is wholly absent from the text of the lower court opinion.

Indeed, the sole reference to the state constitution appears in the opening paragraph where the court holds the search violative of *both* the federal and state constitutions (A. 55).* This perfunctory reference to the state constitution is mere surplusage to the court's examination of the federal constitution, and is wholly insufficient to defeat this Court's jurisdiction. *See California* v. *Carney*, —— U.S. ——, 85 L.Ed.2d 406, 412 n.1 (1985); *Michigan* v. *Long*, 77 L.Ed.2d at 1212; *South Dakota* v. *Neville*, 459 U.S. 553, 74 L.Ed.2d 748, 754 n.5 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 651-652 (1979) (jurisdiction upheld where state courts relied on both federal and state constitutions). This is especially true because following that singular reference, the New York Court of Appeals, relying on this Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977) and *Katz* v. *United States*, 389 U.S. 347 (1967), states "[t]he Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy' " (A. 57), and then, relying on *Texas* v. *Brown*, 460 U.S. 730 (1983), continues that ". . . simply peering inside an automobile does not constitute a search and the Fourth Amendment consequently does not limit this activity" (A. 57) before relying on this Court's decision in *United States* v. *Place*, 462 U.S. 696 (1983), for

* Numerals preceded by "A." refer to pages of the Joint Appendix.

its conclusion that a search occurred in the instant case* because the officer exposed "hidden areas" (A. 57). What is "clear," in the end, is that the New York Court of Appeals' reliance on the Fourth Amendment and cases from this Court construing that amendment, establishes the substantial federal basis for the decision. *See Ohio* v. *Johnson*, —— U.S. ——, 81 L.Ed.2d 425 (1984); *Texas* v. *Brown*, 75 L.Ed.2d at 507 n.1 (1983); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-567 (1977) (jurisdiction upheld where state courts relied on Supreme Court precedent).

Moreover, even the New York Court of Appeals' decisions relied upon by that court in its opinion below, were based on federal law. The decisions in *People* v. *Harrison*, 57 N.Y.2d 470, 457 N.Y.S.2d 199, 443 N.E.2d 447 (1982) (A. 59), *People* v. *Miller*, 43 N.Y.2d 789, 402 N.Y.S.2d 392, 373 N.E.2d 286 (1977), *aff'g*, 52 A.D.2d 425, 385 N.Y.S.2d 457 (1st Dept. 1976) (A. 57) and *People* v. *Sullivan*, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (1971) (A. 57) all relied exclusively on the Fourth Amendment, while the cases of *People* v. *David L.*, 56 N.Y.2d 698, 451 N.Y.S.2d 733, 436 N.E.2d 1324, *cert. denied*, 459 U.S. 866 (1982), *rev'g on dissenting op.*, 81 A.D.2d 893, 439 N.Y.S.2d 152 (2d Dept.) (A. 59) and *People* v. *Perel*, 34 N.Y.2d 462, 358 N.Y.S.2d 383, 315 N.E.2d 452 (1974) (A. 57) cited to both the federal and state constitutions, but relied almost exclusively on this Court's decisions. *See Oliver* v. *United States*, —— U.S. ——, 80 L.Ed.2d 214, 222 n.5 (1984); *California* v. *Beheler*, 463 U.S. 1121, 77 L.Ed.2d 1275, 1278 n.1 (1983); *Oregon* v. *Kennedy*, 456 U.S. 667, 671 (1982) (jurisdiction upheld where state court relied on state cases interpreting federal law). In fact, of the numerous cases cited in the court's opinion, only *People* v. *Cruz*, 34 N.Y.2d 362, 357 N.Y.S.2d 709, 314 N.E.2d 39 (1974) (A. 57) and *People* v. *Marsh*, 20

* Petitioner challenged this conclusion in our opening brief (Pet. Br. 16-27).

N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967) (A. 59) were decided on the basis of state law and those cases are not relied on as square support for the proposition that the type of police action involved here was unlawful.

Although respondent now claims that *People* v. *Marsh*, 20 N.Y.2d 98 serves as the "foundation" for the court's decision (Resp. Br. 10), it is interesting to note that *Marsh* is not discussed, but merely cited once in the opinion (A. 59) and, even at that, is preceded by the signal "*cf.*" which indicates that it ". . . supports a proposition *different* from the main proposition but sufficiently analogous to lend support." *A Uniform System of Citation ("The Bluebook")* at p. 9 (13th ed. 1981) (emphasis added). Clearly then, *Marsh* could not serve at the "foundation" for the court's decision.

Indeed, respondent's extended discourse on *Marsh* and the present state of New York search and seizure law (Resp. Br. 10-13)* is quite unnecessary in light of this Court's statement in *Michigan* v. *Long*, 77 L.Ed.2d at 1214 that it did ". . . not wish to continue to decide issues of state law that go beyond the opinion that we review . . . ." Since the New York Court of Appeals' opinion discusses neither *Marsh*, nor the development of New York law in this area,

* As we argued in our opening brief, *People* v. *Marsh*, 20 N.Y.2d at 101, decided in 1967, prohibited searches of the *person* incident to arrests for routine traffic violations on the ground that traffic violations pose no danger to police officers; a premise which has been tragically disproven in the eighteen years since that case was decided (Pet. Br. 44n). Although our opening brief provided statistics concerning police officers killed during the routine traffic violation which *Marsh* found so harmless (Pet. Br. 41n), since the filing of our opening brief, new statistics for the first six months of 1985 have been compiled which reveal a startling increase in the number of police officers killed during routine traffic stops. Of the 44 police officers killed during the first six months of 1985, 10 or 23% were killed during routine traffic stops [*source:* FBI, Press Release of August 18, 1985] as contrasted with 1984 when, of the 72 officers killed in the line of duty, 8 or 11% were killed during routine traffic stops. *Source:* FBI, Press Release of May 12, 1985.

but chooses instead to rely upon the Fourth Amendment, respondent's detailed discussion of *Marsh* (Resp. Br. 10-13) is not only unnecessary, but largely irrelevant.

What is relevant, however, is that the New York Court of Appeals has a "long tradition" (Resp. Br. 13) of expanding the rights of criminal defendants under the state constitution. Significantly though, in prior instances in which the New York Court of Appeals has construed its own constitution more broadly than the federal constitution, it has done so clearly and unequivocally, announcing specifically that its ultimate decision was based on the New York constitution alone. *See, e.g., People* v. *Gokey,* 60 N.Y.2d 309, 469 N.Y.S.2d 618, 457 N.E.2d 723 (1983) (although the Fourth Amendment would have permitted the search of a duffle bag as incident to the arrest, the search was unlawful under the New York constitution); *People* v. *Adams,* 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379 (1981) (although the Supreme Court under the federal constitution would admit evidence of a suggestive, though reliable identification, such evidence is not admissible under the New York constitution); *People* v. *Elwell,* 50 N.Y.2d 231, 241, 428 N.Y.S.2d 655, 406 N.E.2d 471 (1980) (although the Supreme Court under the federal constitution would have found that the informant provided the police with probable cause to effect a warrantless arrest of the defendant, the New York constitution required that the officers personally observe additional indicia of criminality); *People* v. *Cunningham,* 49 N.Y.2d 203, 207, 424 N.Y.S.2d 421, 400 N.E.2d 360 (1980) (although the Supreme Court had not construed the federal constitution so broadly, as a matter of state constitutional law, once a suspect in custody requests the assistance of counsel, he may not thereafter, despite a desire to do so, be questioned further without the presence of counsel); *see also, People* v. *McIntyre,* 36 N.Y.2d 10, 15, 364 N.Y.S.2d 837, 324 N.E.2d 322 (1974) (although the Supreme Court had not yet recognized the federal constitutional right of a

criminal defendant to proceed *pro se*, the New York constitution clearly recognized such a right).

That the New York Court of Appeals, with this "long tradition" of unequivocally pronouncing its reliance on the New York constitution to expand defendants' rights, refuses to make such a pronouncement in its opinion below, is no mere coincidence. On the contrary, the court's reticence in this regard, when coupled with its repeated citation to the Fourth Amendment and this Court's decisions construing that amendment, makes crystal clear its intention to base the decision below on the federal constitution.

Indeed, the clarity of the court's intention to base its decision on federal grounds is not blurred by the discussion, toward the conclusion of the opinion, of New York Vehicle & Traffic Law § 401(4) (McKinney 1984). Although respondent maintains that the New York Court of Appeals' parting reference to this statute establishes an adequate and independent state ground (Resp. Br. 12-13), an examination of the statute itself, omitted from respondent's brief, proves that it could not conceivably constitute such an adequate and independent state ground.

New York Vehicle & Traffic Law § 401(4) (McKinney 1984) provides, in pertinent part:

> Carrying certificate of registration. Every person operating a motor vehicle or a motor vehicle and a trailer, registered or transferred in accordance with any of the provisions of this chapter, shall upon demand of any magistrate, motor vehicle inspector, peace officer, acting pursuant to his special duties, or police officer produce for inspection the certificate of registration or the registration renewal stub for such vehicle and shall furnish to such magistrate, inspector, peace officer or police officer any information necessary for the identification of such vehicle and its owner, and all information required concerning his license to operate,

> if he is required by law to have such a license, and shall, if required, sign his name in the presence of such magistrate, inspector, peace officer or police officer as a further means of identification (A. 59).

Plainly, this statutory provision, which is administrative in nature, expressly assures a police officer's right to demand a motorist's license and registration, and does not address the right of a police officer to search or inspect that motorist's vehicle. For this reason, the New York Court of Appeals refuses to authorize the instant VIN inspection under this largely inapposite statute. However, respondent has seriously erred by equating this refusal to find authority in that statute for a VIN inspection, with an argument that the statute constitutes an independent state ground prohibiting the VIN inspection. Neither by its language, nor by the lower court's opinion, can this statute be construed as affirmatively prohibiting the type of police conduct which occurred here. Rather, according to the New York Court of Appeals, only the Fourth Amendment constitutes such a prohibition and had that amendment not prohibited the search, no state statute would have prevented the officers from undertaking the VIN inspection. Therefore, this Court has jurisdiction to review petitioner's claim.

B. The Record Below Supports Petitioner's Arguments

Throughout the litigation of this case in the New York courts, petitioner has consistently asserted that the search of respondent's vehicle was reasonable under the Fourth Amendment. In our opening brief, we proffered two alternative theories concerning the reasonableness of the search which had not been pursued in the state courts (Pet. Br. 34-49). Respondent now claims that these new analytical approaches cannot be considered by this Court, but his claim is meritless because the new approaches, which are based on the identical issue raised in both the state courts and our petition for certiorari, are fully supported by the record.

At the outset, it should be noted that respondent is correct in his assertion that "[a] long-standing rule of this Court bars review of *questions* urged by a petitioner or appellant that were not presented to or passed on by the lower courts" (Resp. Br. 34) (emphasis added). He has seriously erred however, in claiming that petitioner has somehow changed the question from that raised in the New York courts. That *question* is, was, and remains whether the search of respondent's vehicle was reasonable under the Fourth Amendment and only the *analysis* of that question has changed. Petitioner presents this Court with two new analytical approches to the unchanged question of reasonableness under the Fourth Amendment: one provides that respondent's status as an unlicensed driver deprived him of any legitimate and reasonable expectation of privacy with regard to the vehicle's passenger compartment, rendering its search reasonable under the Fourth Amendment (Pet. Br. 34-38); and the other provides that the search of the passenger compartment was reasonable and, thus, lawful under this Court's holding in *New York* v. *Belton*, 453 U.S. 454 (1981) as incident to respondent's seizure for a traffic violation (Pet. Br. 38-49).

Apparently, respondent has seemed to confuse the rule of this Court prohibiting the raising of new questions or claims, with the equally well established rule allowing parties to raise new or alternative theories in support of the claims or questions previously raised in state court. *See Illinois* v. *Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 554 (1983) (White, J., concurring) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below."); *Scott* v. *United States*, 436 U.S. 128, 138 (1978) (search may be sustained under a different theory than that used initially to justify it); *Fuller* v. *Oregon*, 417 U.S. 40, 58 (1974) (The Court may adopt alternative theories from those raised in state courts

provided the federal question is not rendered "substantially different."); *Stanley* v. *Illinois,* 405 U.S. 645, 658 n.10 (1972) (The Court's method of analysis may differ from that utilized by the lower court); *Raley* v. *Ohio,* 360 U.S. 423, 437 n.12 (1959) (arguments may vary from those raised below); *Dewey* v. *Des Moines,* 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."); *see also* R. Stern and E. Gressman, *Supreme Court Practice* 230 (5th ed. 1978) (a litigant "may advance different theories or arguments in support of the questions raised in the state courts."); *cf. Wilson* v. *Cook,* 327 U.S. 474, 483 (1946) (argument raised before the Court was no mere "enlargement" of the one raised in state court but was "so distinct" that the Court would not consider it). Taken to its logical extreme, respondent's argument equating the raising of new questions with the use of new or alternative arguments, would require all litigants before this Court to file briefs essentially identical to those filed in state court lest they fear rejection of their claims for even the slightest deviation in their analyses. Obviously, this Court has never endorsed such a practice and alternative theories in support of claims raised in lower courts have always been included in briefs and reviewed by this Court. Accordingly, this Court may review petitioner's new analytical approaches to the identical question raised in the state courts, our petition for certiorari and our opening brief, i.e., whether the search of respondent's vehicle was reasonable under the Fourth Amendment.

Indeed, this Court may review these new arguments notwithstanding its decision in *Illinois* v. *Gates,* 76 L.Ed.2d 572 and *Steagald* v. *United States,* 451 U.S. 204 (1981), upon which respondent relies so heavily (Resp. Br. 35-36). Those cases raised for the first time on writ of certiorari, respectively, claims of a "good faith" exception to the

exclusionary rule and defendant's lack of "standing"* to contest the search; threshold issues regarding the remedy or right to seek a remedy under the Fourth Amendment as distinguished from the reasonableness of the searches themselves under that amendment. Thus, in marked contrast to the instant case, those cases clearly concerned "substantially different" [*Fuller* v. *Oregon*, 417 U.S. at 58] claims and not just new theories. In fact, *Gates* and *Steagald* involved claims that were so radically different from those raised in the lower courts, that the records in the cases were woefully inadequate to support either the "good faith" of the police officers or the privacy interests necessary for defendant to have "standing." *See Illinois* v. *Gates*, 76 L.Ed.2d at 537; *Steagald* v. *United States*, 451 U.S. at 210; *see also Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

Here, however, petitioner's new theories concerning the reasonableness of the search have more than ample support in the record. The record contains the following testimony concerning respondent's status as an unlicensed driver:

> Q. Mr. Class, the day you were stopped by police did you have a license on you?
>
> A. No.
>
> The Court: You have to speak up.
>
> A. No, sir.
>
> Q. On that day, were you a licensed operator?
>
> A. No.

(A. 36). Obviously then, not only was respondent missing his driver's license when the police stopped him, but he

* Although respondent characterizes our argument concerning his status as an unlicensed driver (Pet. Br. 34-38) as a "standing" argument (Resp. Br. 41-46), in fact, it is not, and relates solely to respondent's expectation of privacy as it bears on the reasonableness of the intrusion or search involved, which we agree he had the right to contest.

was not even a licensed driver at that time.* The record could not conceivably have been more clear on this issue.

Equally clear from the record was respondent's commission of various traffic violations (A. 12, 13, 19, 21). Although respondent laments the absence of ". . . evidence that respondent *would have* been arrested . . ." (Resp. Br. 39) (emphasis added) for these traffic violations, such evidence plays no role in the formulation of our argument. In our opening brief we argue only that based on his traffic violations, New York Law [N.Y. Crim. Proc. Law § 140.10(2) (McKinney 1984); N.Y. Veh. & Traf. Law § 155 (McKinney 1984)] provides that respondent *could have* been arrested, and it is this power to arrest from which the right to search evolves (Pet. Br. 38-49). What the officers would have done is quite irrelevant insofar as our argument, after the establishment of the traffic violations themselves, is legal and not factual in nature. Thus, the evidence in the record concerning the traffic violations is more than sufficient to support our purely legal argument that respondent could have been arrested for the traffic violations and, hence, his car could have been searched. Therefore, petitioner's claims are fully supported by the record and are properly before this Court.

POINT TWO

The routine inspection of respondent's VIN plate following the lawful stop of his vehicle for a traffic violation was reasonable and, thus, lawful.

In our opening brief we advance several alternative theories in support of the instant VIN inspection, including the argument that probable cause existed to arrest respondent, not for car theft, but for a traffic violation, and that

* The record also establishes that respondent was issued a summons for being an unlicensed operator (A. 19).

this fact justified a VIN inspection (Pet. Br. 32). Though our arguments are diverse, they are bound together by a single theme: the reasonableness of the police conduct. Nevertheless, foresaking any attempt to analyze the police conduct for its reasonableness, respondent argues in his brief that since the VIN inspection was unsupported by either "probable cause" or "reasonable suspicion" to believe the vehicle was stolen, it was *per se* violative of the Fourth Amendment (Resp. Br. 22-34). This analytical approach is fundamentally flawed, however, because it ignores the ultimate question of reasonableness under the Fourth Amendment; a question not amenable to easy resolution through reflexive reliance on neat, familiar concepts such as "probable cause" or "reasonable suspicion."

In the first instance, it is axiomatic that the "ultimate" inquiry upon review of a particular search under the Fourth Amendment is whether or not that search was "reasonable." *See United States* v. *Villamonte-Marquez,* 462 U.S. 579, 77 L.Ed.2d 22, 30 (1983); *Michigan* v. *Summers,* 452 U.S. 692, 699-700 (1981); *Payton* v. *New York,* 445 U.S. 573, 620 (1980) (White, J., dissenting); *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 315-316 (1978); *Pennsylvania* v. *Mimms,* 434 U.S. 106, 108-109 (1977); *Terry* v. *Ohio,* 392 U.S. 1, 19 (1968); *Camara* v. *Municipal Court,* 387 U.S. 523, 539 (1967). Although the concepts of "probable cause" and "reasonable suspicion" are often useful in determining the reasonableness of a given search, they are not, as respondent claims, "inviolate" (Resp. Br. 22) and this Court has upheld searches lacking in either "probable cause" or "reasonable suspicion" concluding that they nevertheless passed muster under the "ultimate" test of reasonableness. *See New Jersey* v. *T.L.O.,* —— U.S. ——, 83 L.Ed.2d 720, 734 (1985) (refusing to apply the probable cause standard to searches of students by school officials and adopting a general reasonableness standard to govern such searches); *United States* v. *Villamonte-Marquez,* 77 L.Ed.2d at 30-31 (refusing to apply an "articulable suspicion" standard to

random searches of vessels at sea and upholding such searches under the "overarching principle of reasonableness"); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (upholding police officers' right to order motorists out of their vehicles following traffic violations as reasonable, notwithstanding the absence of anything "unusual or suspicious" about their behavior); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-562 (1976) (upholding border patrol stops of vehicles at fixed checkpoints as reasonable notwithstanding the absence of "individualized suspicion"); *see also Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring) (eschewing a "hard-and-fast standard of probable cause" in favor of a reasonableness determination); *cf., Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (probable cause requirement bears on reasonableness determination but is not required under all circumstances). Respondent, however, in his zeal to fit the instant VIN inspection within one of these two useful categories, has completely lost sight of the inherent reasonableness of the police conduct at issue. *See Florida* v. *Royer*, 460 U.S. 491, 519 (1983) (Rehnquist, J., dissenting) (eschewing ". . . a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on . . ." and applying a reasonableness standard to the search at issue). Had respondent analyzed the VIN inspection for its overall reasonableness instead of concentrating exclusively on the presence or absence of either "probable cause" or "reasonable suspicion" to believe the vehicle was stolen, he too would conclude that the minimally intrusive VIN inspection passed muster under the "ultimate" test.

Indeed, following the concededly valid stop of the vehicle for numerous traffic violations,* the officer did nothing more

* These traffic violations serve to distinguish the instant case from *Delaware* v. *Prouse*, 440 U.S. 648 (1979) where this Court struck

(footnote continued on next page)

than open the door of the vehicle and move some papers on the dashboard which obstructed his view of the VIN plate. He did not conduct a rummaging search of the passenger compartment, nor did he ransack it in a determined effort to ferret-out contraband. Rather, he merely displaced several offending scraps of paper and insofar as this simple action was necessitated by respondent's own conduct in obscuring the VIN plate, which would have otherwise been readily viewable to the officer from outside the vehicle, it ill behooves respondent to now protest such a "*de minimis* intrusion." *Pennsylvania* v. *Mimms*, 434 U.S. at 111.

Moreover, since a VIN plate inspection would normally involve the simple act of peering through the windshield at the dashboard, it would have posed no intrusion whatever had it not been for respondent's conduct and thus, it is ironic that he proposes several methods "less intrusive" than a VIN inspection to combat car theft (Resp. Br. 28-29). In any event, not only are "less intrusive" methods such as computer checks less effective because they fail to consider that the vehicle may not have been reported stolen, but, as this Court has so recently recognized ". . . *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, —— U.S. ——, 105 S. Ct. 1568, 1576 (1985); *see Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973) ("The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable.") Thus, respondent's hindsight reliance on plausible, though less effective

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down the practice of randomly stopping vehicles for license inspections because it vested "unbridled discretion" [*id.* at 661] in police officers. Obviously, since the instant stop was precipitated by respondent's numerous traffic violations, it was not the result of "unbridled" police discretion.

alternatives* can undermine neither the reasonableness of the minimally intrusive conduct undertaken, nor the significance of his own actions in obscuring the VIN plate. Viewed in this context, the almost trivial actions of the officer in opening the door and brushing aside some papers on the dashboard, during which he inadvertently observed and seized a loaded weapon [*see Texas* v. *Brown*, 460 U.S. 730 (1983); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) (plurality], though they created an undeserved furor in the New York Court of Appeals, amounted to little more than "much ado about nothing" (Pet. Br. 30). Clearly then, the instant VIN inspection was reasonable and, thus, lawful under the Fourth Amendment.

Conclusion

For the foregoing reasons and those stated in our opening brief, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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* In addition to the license check, another of respondent's "plausible" alternatives was for the officers to have demanded that respondent uncover the VIN plate himself (Resp. Br. 28) which, as we argued in our opening brief (Pet. Br. 26-27), would have had the unsettling result in the instant case of sending respondent back into a vehicle where he had, in fact, concealed a loaded weapon.